1.1 Excessive Force in Violation of the Fourth Amendment[1]

[Updated: 10/17/02]

Pattern Jury Instruction

A. LIABILITY

Federal law[2] provides that [plaintiff] may recover damages if [defendant],[3] acting under color of law, deprived [him/her] of a right guaranteed by the Constitution. The right at stake here is the right to be free from the use of excessive force. [The parties have agreed that [defendant] acted "under color" of law. The only issue for you, therefore, is the issue of excessive force.] You are not to determine the legality of the [*e.g.*, subsequent arrest].

(1) Definition of Excessive Force

Every person has the constitutional right not to be subjected to unreasonable or excessive force by a law enforcement officer. On the other hand, in [making an investigatory traffic stop, making an arrest, etc.] an officer has the right to use such force as [he/she] reasonably believes is necessary under the circumstances to [complete the investigatory traffic stop, effectuate the arrest, etc.]. Whether or not the force used was unnecessary, unreasonable or excessively violent is an issue for you to decide on the basis of that degree of force that a reasonable and prudent law enforcement officer would have applied under the same circumstances disclosed in this case. The test of reasonableness requires careful attention to the facts and circumstances including, but not limited to, the severity of the [crime the officer was investigating, crime for which the arrest was made, etc.]; whether [plaintiff] posed an immediate threat to the safety of the officer or others; whether [he/she] was actively resisting the [investigatory traffic stop, arrest, etc.]; and the severity of any injury to [him/her].[4]

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. With respect to a claim of excessive force, the standard of reasonableness at that moment applies. Not every push or shove, even if it may later seem unnecessary, violates the Constitution. The determination of reasonableness must allow for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.

The "reasonableness" inquiry is an objective one. The question is whether an officer's actions are "objectively reasonable" in light of all the facts and circumstances confronting [him/her], without regard to [his/her] underlying intent or motivation. Evil intentions will not make a constitutional violation out of an objectively reasonable use of force; and good intentions will not make an unreasonable use of force proper.

(2) Elements of the Plaintiff's Claim

In order to prove [his/her] claim of unconstitutionally excessive force, [plaintiff] must prove by a preponderance of the evidence the following:

That [defendant] intentionally, rather than negligently, used unconstitutionally excessive force as I have defined it. However, it is not necessary to find that [defendant] had any specific purpose or desire to deprive [plaintiff] of [his/her] constitutional rights in order to find in favor of [plaintiff]. [Plaintiff] must prove only that the *action* was deliberate, not that the *consequence* was intended. Mere negligence, however, is not sufficient. [Plaintiff] is entitled to relief if [defendant] intentionally acted in a manner that resulted in a violation of [plaintiff]'s constitutional rights.[5]

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[1] This instruction is only appropriate for use in cases governed by the Fourth Amendment. In excessive force cases, the applicable legal standard is determined "by identifying the specific constitutional right allegedly infringed by the challenged application of force." Graham v. Connor, 490 U.S. 386, 394 (1989). "[*A*]*ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." Id. at 395; accord Aponte Matos v. Toledo Davila, 135 F.3d 182, 191 (1st Cir. 1998). "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen." Graham, 490 U.S. at 395 n.10 (citations omitted). Furthermore, it is not enough that the claim of excessive force "arises in the context of an arrest or investigatory stop" (i.e., injury to a bystander during a high speed chase); the allegedly excessive force must result from "an intentional acquisition of physical control" by the police. Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795 & n.8 (1st Cir. 1990).

The Eighth Amendment (which prohibits "the unnecessary and wanton infliction of pain") governs claims of excessive force arising after a person has been convicted and while the person is in government custody. Hudson v. McMillian, 503 U.S. 1, 5 (1992); see also Davis v. Rennie, 264 F.3d 86, 98 n.9 (1st Cir. 2001) ("A convicted prisoner may bring a claim for use of excessive force under the Eighth Amendment" (citing Hudson, 503 U.S. at 4)). See Instructions 2.1 and 2.2 for Eighth Amendment excessive force claims.

The Supreme Court has not yet decided whether the Fourth or Eighth Amendments apply "at the point where arrest ends and pretrial detention begins," but "[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." Graham, 490 U.S. at 395 n.10; see also Davis, 264 F.3d at 101-02 (citing cases where other courts have adopted or rejected the use of the Fourth Amendment "objectively reasonable" standard in pretrial detention and involuntary commitment situations); Brady v. Dill, 187 F.3d 104, 110 n.5 (1st Cir. 1999) (recognizing that this question is still open). The First Circuit has added that through the due process clause, "the standard to be applied is the same as that used in Eighth Amendment cases." Burrell v. Hampshire County, No. 02-1504, 2002 WL 31218304, at *5 (1st Cir. Oct. 4, 2002); Calderón-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002) (pretrial detainees have protection "at least as great as the Eighth Amendment protections available to a convicted prisoner" (quoting City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983))).

[2] Although the notes accompanying these instructions generally cite section 1983 caselaw, these instructions should also be usable in excessive force cases against federal actors based on Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). See Graham v. Connor, 490 U.S. 386, 394 n.9 (1989) (while discussing the role of the Fourth Amendment in a section 1983 excessive force case, the Court noted that "[t]he same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under [Bivens]"), cited in Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) ("The analysis of a qualified immunity defense is identical for actions brought under § 1983 and Bivens."); see also Butz v. Economou, 438 U.S. 478, 496-505 (1978), cited in Laswell v. Brown, 683 F.2d 261, 268 n.11 (1st Cir. 1982) ("The Butz case looked to 42 U.S.C. § 1983 cases to determine the correct nature of immunity of officials in suits based on Bivens. The same approach is appropriate with regard to the issue of whether respondeat superior is available in Bivens actions." (internal citation omitted)); Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993) ("[A]bsent a specific statutory provision to the contrary, there is no

principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgment of rights under Bivens." (citing Butz, 438 U.S. at 500)).

[3] This instruction is drafted for cases where the plaintiff claims that the defendant personally inflicted the excessive force. A defendant may also be held liable "for his failure to intervene in appropriate circumstances to protect an arrestee from the excessive use of force by his fellow officers." Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002). But an action for damages for violation of the Fourth Amendment is necessarily based on 42 U.S.C. § 1983, Graham v. Connor, 490 U.S. 386, 393-94 (1989), and section 1983 does not allow recovery on *respondeat superior* theories of liability. Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir. 1985) ("The Supreme Court has firmly rejected *respondeat superior* as a basis for section 1983 liability of supervisory officials or municipalities." (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 691, 694 n.58 (1978))).

As a general rule, in order for a supervisor to be liable for a subordinate's excessive force, there must be "an 'affirmative link' between the conduct of the supervisor and that of the employee." Voutour, 761 F.2d at 820 (citing Rizzo v. Goode, 423 U.S. 362, 371 (1976)); accord Aponte Matos, 135 F.3d at 192. The "affirmative link must amount to 'supervisory encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference.'" Aponte Matos, 135 F.3d at 192 (citing Lipsett v. University of P.R., 864 F.2d 881, 902 (1st Cir. 1988)). Furthermore, this "affirmative link" must be substantiated with "proof that the supervisor's conduct led inexorably to the constitutional violation." Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir. 1997) (citing Hegarty v. Somerset County, 53 F.3d 1367, 1380 (1st Cir. 1995)).

This general rule actually encompasses two different types of supervisory liability, the liability of municipalities and the liability of individual supervisors, each of which is governed by a different definition of the type of "affirmative link" that is necessary. A municipal defendant is only liable if its policies or customs "evidence[] a 'deliberate indifference' to the rights of its inhabitants," and "are the moving force behind the constitutional violation." City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989); see also Monell, 436 U.S. at 690 ("Local governing bodies … can be sued directly under § 1983 … where … the action that is alleged to be unconstitutional implements, or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (footnotes omitted)). A municipality's policies and customs include not only formal, affirmative policies, but also inaction, such as a failure to properly train its police officers. City of Canton, 489 U.S. at 388-89; Town of Mendon, 294 F.3d at 6.

The liability of individual supervisors differs from that of municipalities in two respects. First, an individual supervisor may be liable not only for deliberate indifference to the rights of others, but also for reckless or callous indifference. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 & n.8 (1st Cir. 1989). Second, an individual supervisor is liable for his or her acts or omissions; there is no need to demonstrate that those acts or omissions constituted a policy, pattern or custom. Id. at 567.

In either a municipal liability case or an individual supervisory liability case, it will be necessary to alter the language in the jury charge to reflect the particular nature of supervisory liability under section 1983. It is advisable to refer specifically to the "affirmative link" requirement, but such language is not strictly necessary. If worded appropriately, it may be sufficient to use standard proximate cause language. See id. at 569 (approving instruction that "informed the jury that there needed to be a causal connection between the acts or omissions of the supervisors and the unconstitutional activities of the officers," even though it did not use 'affirmative link' language). But "[w]ithout a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of section 1983 damages liability on the part of the municipality." Town of Mendon, 294 F.3d at 7.

In no event may a plaintiff sue a state directly under section 1983; such claims are barred by the Eleventh Amendment. Day v. Massachusetts Air Nat'l Guard, 167 F.3d 678, 686 (1st Cir. 1999) (citing Alabama v. Pugh, 438 U.S. 781, 782 (1978)).

[4] Objective reasonableness is the standard. Graham v. Connor, 490 U.S. 386, 388 (1989); Alexis v. McDonald's Rests. of Mass., Inc., 67 F.3d 341, 352 (1st Cir. 1995). The factors that test reasonableness come from Graham, 490 U.S. at 396-97, and Bastien v. Goddard, 279 F.3d 10, 14-16 (1st Cir. 2002), where the First Circuit held that serious injury is *not* a prerequisite to an excessive force claim, but that it is a factor that may be considered.

[5] The instruction does not include a qualified immunity component. In Saucier v. Katz, 533 U.S. 194, 204-09 (2001), the United States Supreme Court held that the objective reasonableness inquiry of the Fourth Amendment, see Graham v. Connor, 490 U.S. 386 (1989), does not merge with the qualified immunity analysis under Anderson v. Creighton, 483 U.S. 635 (1987). Nevertheless, the First Circuit has said that: "Qualified immunity, which is a question of law, is an issue that is appropriately decided by the court during the early stages of the proceedings and should not be decided by the jury." Tatro v. Kervin, 41 F.3d 9, 15 (1st Cir. 1994). Although that pronouncement

sounds definitive, the Tatro court went on to say in the next paragraph: "In any event, if a court does feel obligated to give the defendant[] the benefit of qualified immunity at the final stage of the trial, or, more appropriately, if it needs to resolve factual issues related to qualified immunity, it must do so without using potentially misleading language. . . ." Id. (citation omitted). That language suggests that at most an instruction might ask for specific findings from the jury such that the court can determine whether qualified immunity should apply.

In its decisions since Tatro, the First Circuit has consistently supported the principle of requiring the court to defer to the fact finder for the resolution of any "factual dispute underlying the qualified immunity defense." Kelley v. LaForce, 288 F.3d 1, 7 n.2 (1st Cir. 2002). In St. Hilaire v. City of Laconia, 71 F.3d 20 (1st. Cir. 1995), the court said:

> [I]f there is a factual dispute, that factual dispute must be resolved by a fact finder. The precise question of whether the judge may intercede and play that fact-finder role appears not to have been clearly decided by the Supreme Court. Some courts, consonant with the Seventh Amendment, have preserved the fact finding function of the jury through special interrogatories to the jury as to the disputes of fact, reserving the ultimate law question to the judge.

Id. at 24 n.1 (citations omitted); accord Finnegan v. Fountain, 915 F.2d 817, 821, 823-24 (2d Cir. 1990), rejected on other grounds by, Saucier, 533 U.S. at 204-05. Later, in Ringuette v. City of Fall River, 146 F.3d 1 (1st Cir. 1998), the court noted:

> Something of a "black hole" exists in the law as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved on summary judgment prior to trial. To avoid duplication, judges have sometimes deferred a decision until the trial testimony was in or even submitted the factual issues to the jury. In all events, the district judge's procedure here [making factual determinations based upon evidence presented to the jury], which is not challenged on appeal, seems to us to have been eminently sensible.

Id. at 6 (citations omitted). Most recently, after acknowledging that the Supreme Court had not "clearly indicated" what the judge's role should be, the First Circuit stated: "[W]hen facts are in dispute, 'we doubt the Supreme Court intended this dispute to be resolved from the bench by fiat.'" Kelley, 288 F.3d 1, 7 n.2 (quoting Prokey v. Watkins, 942 F.2d 67, 72 (1st Cir. 1991)).